

**DECISION OF THE ASSISTANT CERTIFICATION OFFICER ON AN
APPLICATION MADE UNDER SECTION 108A(1) OF THE TRADE UNION
AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992**

Mr J DOYLE

v

GMB

Date of Decision:

11 January 2006

DECISION

Upon application by the Claimant under section 108A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).

- (i) I declare that the GMB (“the Union”) acted in breach of its rule 15.2 by not seeking nominations from the Union’s branches forthwith following the resignation of the former General Secretary on 7 April 2005.
- (ii) I do not consider it would be appropriate to issue an enforcement order.

REASONS

1. By an application dated 17 July 2005 the Claimant made a complaint against his union, the GMB (“the Union”). The Claimant alleged a breach of the Union’s rules relating to the election of the Union’s General Secretary. This is a matter within the jurisdiction of the Certification Officer by virtue of section 108A(2)(a) of the 1992 Act. The alleged breach was that:-

“In breach of rule 15.2, the union’s Central Executive Council has failed to seek nominations from the union’s branches, forthwith, for the vacant post of General Secretary of the union, following the resignation of the former General Secretary on 7 April 2005.”

2. I investigated this alleged breach in correspondence. As required by section 108B (2)(b) of the 1992 Act, the parties were offered the opportunity of a formal hearing and such a hearing took place on 14 December 2005. The Union was represented by Mr Galbraith-Marten of Counsel instructed by Mr O’Hara of Thompsons, solicitors. Mr A J Garley, Regional Secretary of GMB South

Western Region and a member of the Union's Central Executive Council (CEC) gave evidence on its behalf and provided a written witness statement. The Claimant acted in person and gave evidence on his own behalf. A bundle of the relevant documents was prepared for the hearing by my office. The Union's rules were also in evidence. Both parties presented skeleton arguments.

Findings of Fact

3. Having heard the parties and considered the documents provided by them, I find the facts to be as follows.
4. The Claimant is a member of the Newcastle and North Tyne branch of the Union, having retired as a Union organiser. The Chief Executive Officer in the GMB is called the "General Secretary and Treasurer". I shall follow the usual practice in the Union and refer simply to the 'General Secretary'.
5. On 29 October 2002 the then General Secretary of the Union told the CEC that he and the Deputy General Secretary (DGS) would retire at the same time to allow a combined election for the two posts. In the case of the DGS this was an early retirement. The CEC accepted this position and agreed that papers with draft by-laws and proposed timetables should be put to the CEC at its next meeting.
6. On 3 December 2002 by-laws and timetable were agreed by the CEC. In the three days following that decision, nomination forms were issued to branches via Regions. Nominations were received and processed according to rule and voting by members took place between 21 March and 14 April 2003. The result was declared by the Independent Scrutineers on 15 April. Mr Curran was elected General Secretary and Ms Coulter DGS. They assumed office on 18 May 2003.
7. On 2 June 2003 the union's Appeal Committee upheld a complaint from a member, Mr Fraser, to the effect that he had received material during the election which pointed to the misuse of the Union's database. The Appeals Committee recommended an investigation into the misuse of the Union's database. This eventually led, in July 2004, to the CEC appointing for this purpose a senior lay official and two retired Regional Secretaries as the Election Group. This is referred to as the First Investigation.
8. On 26 September 2003 the Certification Officer found that Mr Stokes, a member of the Union, had been unreasonably excluded from being a candidate in the election for DGS (*Stokes v GMB CO D/24-27/03*). The Certification Officer ordered that election to be re-run.
9. On 2 December 2003 the CEC triggered a fresh election for the DGS. They agreed that the election would be cancelled if the union won its appeal, against the Certification Officer's decision, to the Employment Appeal Tribunal ("EAT"). The appeal was lost and the result of the election was declared on 29 March 2004.

Ms Coulter was elected. On 27 April 2004 the CEC set up a working party under the Union's Vice President, to review election procedures. This is referred to as the Second Investigation.

10. At the meeting of the CEC on 7 December 2004, the Union's President reported that she had received two letters from legal representatives involved in an Employment Tribunal case brought by a senior organiser in the Union's Lancashire Region, alleging sex discrimination. The President reported that these letters "*made allegations of illegal acts, serious matters and allegations of breaches of Union rules.*" The CEC asked the General Purposes Committee (GPC) to agree terms of reference and appoint a suitable independent person to investigate these allegations.
11. Because of illness, the Union's General Secretary was not present at the meeting on 7 December. He subsequently complained, in writing to the CEC, that the statement by the President had been made without his knowledge and that the follow-up to the statement was being conducted in a way that was contrary to the Union's rules. He also alleged that along with others, two of the candidates he had defeated in 2003 (Mr Worth and Mr Kenny) were seeking to undermine his position. He proposed an independent enquiry chaired by someone nominated by the Chairman of the Bar Council to investigate all allegations. The CEC considered this at its meeting on 15 February 2005 and after wide debate the CEC appointed John Hand QC to chair an enquiry - the Third Investigation. This was to embrace the First and Second investigations.
12. On 15 March 2005 for reasons not directly relevant to this complaint, Mr Curran was suspended as General Secretary. On 23 March the CEC appointed Mr Kenny as Acting General Secretary. A post which he still holds and which, Congress was told debars him from being a candidate in an election for the post of General Secretary.
13. Subsequently on 6 April 2005 Mr Curran entered a compromise agreement with the Union which included his resignation as General Secretary with effect from 6 May.
14. On 7 April in a joint statement to the Press and on the Union's web site it was announced that Mr Curran had resigned as General Secretary.
15. The normal process in elections in the GMB is for the CEC to be told about a vacancy, immediate or pending, and for the CEC to call for papers covering the by-laws and timetable under which an election will be held. Those papers will be presented at the next meeting of the CEC and nominations sought once the by-laws and timetable are agreed. Usually some 4-5 months lapse between nominations being sought and the result declared.

16. On 19 April 2005 the CEC were told that Mr Curran's resignation date was 6 May. Mr Kenny, the Acting General Secretary drew attention to the requirement of rule 15.2 for an election to be called forthwith and told the CEC they could do that if they wished. However he suggested that a report be made to Congress 2005 amending rule 15.2 to allow the CEC to determine when an election was triggered. The reports on the investigations into past elections with any proposals for future arrangements could be put to Congress in 2006 and a new General Secretary elected by the end of 2006. The CEC accepted this suggestion.
17. The CEC also agreed that the Third Investigation under John Hand QC should be stood down and replaced by an internal investigation. Mr King, from the Union's solicitors, was to act as legal adviser and chair of the Enquiry - which I shall call the Fourth Investigation.
18. The CEC next met on 4 June prior to Congress opening on 5 June. It agreed a statement to be put to Congress culminating in a proposed rule change. The statement mentioned that as well as rule 15.2 there were statutory provisions governing the election of the General Secretary; but said that exceptional circumstances weighed against calling an election at this time. The statement stressed, in particular, the need to receive and act on the outcome of the investigations that were in train.
19. It charged the Fourth Investigation with looking at the following matters:
- “ a *looking into alleged breaches of Union rules in the 2003 election of General Secretary and the 2004 election of Deputy General Secretary;*
- b *considering our elective process and procedures and giving guidance to prevent or minimise malpractice and/or malfeasance in future elections;*
- c. *considering evidence given under oath at an Employment Tribunal in Manchester, alleging that illegal and/or unlawful acts had been committed during the course of the Tribunal;*
- d. *considering recent allegations made in the press and*
- e. *taking account of such other matters as may be considered appropriate or desirable in order to present a full, fair and thorough report to the Central Executive Council.”*
20. The statement also set out the steps that had been taken to ensure the accountability of the Acting General Secretary to the CEC. On 5 June 2005 Congress accepted the proposed change to rule 15.2 - which is set out in paragraph 22 below.

The Relevant Statutory Provisions

21. The provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) which are relevant for the purpose of this application are as follows:-

Section 108A Right to apply to Certification Officer

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

- (a) the appointment or election of a person to, or the removal of a person from, any office;
- (b) ...
- (c) ...
- (d) ...
- (e) ...

Section 108B Declarations and orders

(3) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or both of the following requirements-

- (a) to take such steps to remedy the breach, or withdraw the threat of a breach, as maybe specified in the order;
- (b) to abstain from such acts as may be so specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

(4) The Certification Officer shall in an order imposing any such requirement as is mentioned in subsection (3)(a) specify the period within which the union is to comply with the requirement.

The Relevant Union Rules

22. The rules of the Union relevant to this application are as follows:-

Rule 9 BUSINESS OF THE CONGRESS

3 The Congress by a majority vote shall have power to rescind, alter and add to any of these rules. Consideration of amendments to rules shall be restricted to the Ordinary Congress held in 1999 and thereafter to every second Ordinary Congress. The Central Executive Council shall, nevertheless, have power to submit to any Congress (Ordinary or Special) amendments to rules.

Rule 15 ELECTION OF THE GENERAL SECRETARY AND TREASURER, AND OF DEPUTY GENERAL SECRETARY

2 Nominations shall be sought from the Branches of the Union by the Central Executive Council six months before the term of office expires, or forthwith in the event of a vacancy. Nominations shall be sent by Branches to a Returning Officer appointed by the Central Executive Council.

- 4 The organisation and conduct of elections under this Rule shall be in accordance with by-laws issued by the Central Executive Council. by-laws made under this rule may specify whether failure to comply with any and if so which by-laws shall disqualify a candidate from standing for election. The Central Executive Council may amend or withdraw any by-law as it thinks fit.

Rule 15.2A [as amended at Congress 5 June 2005]

The reference in the preceding clause to “forthwith in the event of a vacancy” will not operate in respect of the vacancy arising on the resignation of Kevin Curran as General Secretary and Treasurer with effect from 6 May 2005. The Central Executive Council will prepare a timetable and by-laws for nominations for and the election of General Secretary and Treasurer as seems to it most appropriate but in any event such that nominations are invited no later than one week after Congress 2006 closes unless that Congress resolves that the date for nominations should be further deferred.”

A Summary of the Submissions

The Claimant

23. The Claimant advanced his complaint exclusively as one of breach of rule. He submitted that the Union’s CEC failed to seek nominations from the Union’s branches, forthwith, for the vacant post of General Secretary of the Union following the resignation of the former General Secretary on 7 April 2005. This action, he claimed, was in breach of rule 15.2 of the GMB rule book which, on the election of the General Secretary and Treasurer, states

"nominations shall be sought from the Branches of the Union by the Central Executive Council six months before the term of office expires, or forthwith in the event of a vacancy."

24. In the Claimant’s view, once the General Secretary’s resignation was announced to the Union on 7 April 2005 the CEC could and should have called for an election at its next meeting which was on 19 April. There was no good reason for it not to do so. The subsequent rule change recommended to, and adopted by, Congress on 5 June in effect means that under its rules the Union is not now required to initiate the holding of an election for the position of General Secretary until at least after the 2006 Congress.
25. There was no need, the Claimant argued, for the CEC to wait for the General Secretary’s resignation to take effect on 6 May 2005. In the past the process of an election had been started before a post was actually vacant and that should have happened on this occasion. Even on the Union’s argument that the process did not have to start until after 6 May the CEC should have started the process at its next meeting following that date, ie on 4 June.
26. The Claimant stated that the reasons given by the Union for delaying the decision on 19 April and 4 June were spurious and should be set aside.

27. The Union's argument that the election should be delayed until the findings of its internal inquiry into the conduct of national elections were available reflected, in the Claimant's view, a deliberate lengthy postponement of the election.
28. The Claimant argued that the issues which had been referred to the enquiries could have been dealt with more expeditiously. Issues about access to the database would be for the returning officer; the allegations made in the course of an Employment Tribunal in Manchester had never been spelled out and the decision of that Tribunal recorded nothing that should be of serious concern to the Union in arranging elections. The former General Secretary had proposed an independent enquiry into all the issues causing concern to the CEC and to him. The CEC wanted any inquiry to be internal and once the General Secretary resigned, the independent chair, John Hand QC, was stood down and the panel expanded in terms both of membership and remit and the independent element eliminated.
29. In the Claimant's eyes, matters have been deliberately aligned with the intention of denying members of the Union an opportunity to make nominations for the post of General Secretary. The deployment of the argument that elections must await the outcome of prolonged internal inquiries is understandable only as a device to block the normal operation of Rule 15.2.
30. The Claimant contended that rule 15.2 had been breached and that an enforcement order was needed in the light of the facts that the Union had deliberately prevented branches and members from nominating and electing a new General Secretary; that from April 2005 to, at least, December 2006 and possibly beyond, the Union would be without a properly elected General Secretary and that the person covering that office was not the DGS but one of the candidates defeated in the last election for the post of General Secretary. He did not think that the Union's actions were worthy of a banana republic never mind a great union.

The Union

31. Mr Galbraith-Marten for the Union pointed me to some of the authorities on the proper interpretation of union rule books. These have been summarised as saying that

"the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose and the readership to which they are addressed."
(*Jacques v. Amalgamated Union of Engineering Workers (Engineering Section)*) [1986] ICR 683)
32. The issue is the interpretation of that part of Rule 15.2 that provides that nominations shall be sought from the Branches of the Union "... forthwith in the event of a vacancy."

33. The Union believed that while the CEC may trigger an election earlier, it is only when the vacancy actually arises (i.e in this case on 6 May 2005) that any obligation under 15.2 arises to trigger an election by announcing the vacancy.
34. As for the term “forthwith”, counsel directed me to the statement in Stroud’s Judicial Dictionary of Words and phrases that in a large group of cases in different contexts ‘forthwith’ has been construed to mean something along the lines of “*as soon as is reasonably practicable in all the circumstances and, in particular, without deliberate and unnecessary delay*”.
35. The Union’s previous practice has been to announce the need for an election at one meeting of the CEC, to adopt by-laws with a timetable for the election at a subsequent meeting and only then to trigger the process by which nominations are sought. This whole process from the announcement of the need to call an election to the result may take many months.
36. In this case, it was argued, the process was begun at the very first meeting of the CEC after Mr Curran’s resignation. The resignation was announced and discussion begun about a way forward - including the implications of rule 15.2.
37. Counsel for the Union contended that there had been no breach of rule 15.2. But, in the alternative, even if there had been a breach of this rule, it was merely a technical breach and it would be inappropriate for me to issue an enforcement order.
38. The decision by the CEC, not to call for an election immediately, was taken because of the exceptional circumstances that existed at the time, namely the questions that had been raised about the integrity of the Union’s electoral processes. There were a number of investigations that it was envisaged would result in a full package of rule changes, by-laws and guidance for the election of senior officers. There was no basis for the Claimant’s assertion that the investigations had been manufactured to block the normal operation of rule 15.2.
39. Moreover, in order to give time for the investigations to be completed, an amendment to rule 15.2 was proposed by the CEC and passed by Congress according to the Union’s rule book. Thus there was no question of a continuing breach of rule 15.2. Any decision of the CEC taken on 19 April 2005 to initiate the election process would have had no practical effect by 5 June at which point Congress decided to delay the election. Thus no substantial, or indeed any, injustice flowed from any error by the CEC on 19 April.
40. I specifically put it to the Union (and the claimant) that if I found a breach of rule had occurred, I would be required by section 108B(3) of the 1992 Act to make an enforcement order, on the Union, unless I found it was inappropriate to do so. I sought their views on which matters I should take into account in reaching a decision on the appropriateness of making an order. In particular I asked if I

should take account of any arguable case that there might be a breach of statute. Mr Galbraith-Marten argued that it would be improper for me to do so, pointing out, that this complaint was made and proceeded with as a breach of Union rule, not a breach of statute. He further argued that there was no power under section 108B(3)(a) to remedy a breach of rule that no longer exists and it would be improper for me to make an order with the intention of remedying any other matter.

Conclusions

41. I accept entirely Mr Galbraith-Marten's submissions in respect of the interpretation of union rule books. Purpose and common sense interpretation are far more important than any attempt at statutory construction. As for counsel's definition of '*forthwith*' I believe the term is often used with more immediate impact than implied by "*as soon as reasonably practicable*". When the Certification Officer issues an order that someone should cease to hold office forthwith, he effectively makes invalid any decision by that person once the union is aware of the order. However as used in rule 15.2, I accept Mr Galbraith-Marten's interpretation of the term.
42. On the tests of purpose and common sense how does the Union's argument fare? In my view it is only by treating the Union's rules as if they were statute that one can argue, as the Union does, that no obligation to trigger an election under rule 15.2. arises until the event of a vacancy actually occurs which in this case, was not until 6 May 2005 when the resignation became effective.
43. In evidence Mr Garley stated that the purpose of the rule was to secure a smooth transition from one elected officer to another. The Claimant took a similar view but rather than smooth, he was more concerned with a timely change. In the context of the rule itself I incline to the Claimant's view. Where a vacancy can be anticipated (as with normal retirement or termination of period of office) the rule states the vacancy should be anticipated by six months. But where unforeseen circumstances make that impossible (as with death or resignation) then the speedy action implied by '*forthwith*' is required. In that context my view is that the ordinary member would be of the opinion that the rule meant that as soon as a vacancy could be firmly anticipated, steps should be taken to seek nominations from branches as soon as reasonably practicable.
44. By 7 April 2005 Union members had been told that Mr Curran had resigned. In that notification there was no mention of 6 May as the effective date of the resignation. That resignation was part of a compromise agreement from which the Union accept Mr Curran could not unilaterally withdraw. In those circumstances I find that from the moment the compromise agreement was signed the Union knew a vacancy was to occur and in order to comply with rule 15.2 it should have taken steps then to ensure that it would be in a position to seek nominations from

branches forthwith (in accordance with the above interpretation of forthwith) as soon as the vacancy occurred.

45. By 19 April, when the CEC met, no such steps had been taken and the CEC decided not to take any but to disregard the obligation under the Union's rule to seek nominations from branches forthwith. Even though it was contemplating asking Congress to change the relevant rule, until the change occurred the Union's rules required it to put itself in a position to seek nominations forthwith. Had the Union done so it would have still been open to it under rule to abort the process if Congress had subsequently agreed to it so doing. Indeed in response to the Certification Officer's order in relation to the election for the Deputy General Secretary post, nominations were sought in the clear knowledge that the election would not continue if the EAT accepted the Union's appeal against the Certification Officer's decision.
46. It is for these reasons that I find that from 7 April 2005 the Union was in breach of its rule 15.2 by not putting itself in a position to seek nominations forthwith from branches in an election to fill the post of General Secretary when it fell vacant on 6 May 2005.
47. As far as an enforcement order is concerned, I note that the Claimant advanced his application as a breach of rule and I have considered it as such. Given that Congress, after following procedures allowed in the rule book, amended the rule that had been breached there is no continuing breach of rule that could be corrected by an order under section 108B(3)(a) of the 1992 Act. It is for that reason that I consider it inappropriate to issue an enforcement order in this case.

E G Whybrew
Assistant Certification Officer